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IN THE

Supreme Court of the United States

MAJOR LEAGUE BASEBALL ADVANCED MEDIA AND THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Petitioners,

v.

C.B.C. DISTRIBUTION AND MARKETING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF FOR NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND NATIONAL FOOTBALL LEAGUE PLAYERS INCORPORATED AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The National Football League Players Association (NFLPA) and the National Football League Players Incorporated (Players Inc) request leave to file an *amici curiae* brief in support of Major League Baseball Advanced Media and The Major League Baseball Players Association's petition for a writ of certiorari.

The NFLPA is the labor union that acts as the exclusive collective-bargaining representative for professional football players in the National Football League. Under the terms of the standard, collectively-bargained NFL Player Contract, players expressly assign to NFLPA all of their "group licensing rights." In addition to the NFL Player Contract, players execute separate Group Licensing Assignments, which are agreements between each player and the NFLPA, under which the players' group-licensing rights are assigned to the NFLPA. The NFLPA holds such rights in connection with almost every NFL player.

These group-licensing rights are then licensed to Players Inc, a for-profit subsidiary of the NFLPA that licenses the intellectual-property rights of NFL players. Currently, Players Inc licenses over 70 companies in the United States and throughout the world to use various aspects of its group-licensing rights in connection with commercial products and services, ranging from artwork and collectibles to trading cards and interactive games.

The NFLPA and Players Inc's brief will assist the Court in its consideration of this petition for certiorari. Given the substantial value of their group-licensing rights, *amici* have a vital interest in clarification of the correct legal test for weighing the interests in enforcing publicity rights against the interests protected by the First Amendment. If left unreviewed, the Eighth Circuit's decision will threaten *amici*'s ability to license players' identities for commercial purposes. As explained more fully in *amici*'s brief, businesses covered by the Eighth Circuit's decision may now be able to reap the benefits of the labor, skills, and achievements of athletes and other celebrated figures, with no return to the individuals themselves. The Eighth Circuit's decision

also upsets settled business practices by compromising the ability of *amici* and other holders of publicity rights to enforce existing agreements that authorize use of an individual's identity and related information for commercial purposes.

Counsel for NFLPA and Players Inc have conferred with counsel for petitioners Major League Baseball Advanced Media and The Major League Baseball Players Association and for respondent C.B.C. Distribution and Marketing, Inc. Petitioners have granted consent for NFLPA and Players Inc to file an *amici curiae* brief in support of their petition. Respondent has withheld consent to NFLPA and Players Inc's filing an *amici curiae* brief.

NFLPA and Players Inc respectfully request that the Court grant leave to file this *amici curiae* brief.

Respectfully submitted,

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BRIEF FOR NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND NATIONAL FOOTBALL LEAGUE PLAYERS INCORPORATED AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

The National Football League Players Association (NFLPA) and the National Football League Players Incorporated (Players Inc) submit this brief as *amici curiae*.[1] The NFLPA is the labor union that acts as the

[1] Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Amici further state, pursuant to Rule 37.2(a), that the petitioners have consented to the filing of this brief and counsel of record for both parties have been given at least ten days notice of amici's intention to file this brief.

exclusive collective-bargaining representative for professional football players in the National Football League. Under the terms of the standard, collectively-bargained NFL Player Contract, players expressly assign to NFLPA all of their "group licensing rights," which encompass the use of the players' names, signatures, facsimile voices, pictures, photographs, likenesses, and biographical information in connection with licensing programs that involve groups of six or more players. In addition to the NFL Player Contract, players execute separate Group Licensing Assignments, which are agreements between each player and the NFLPA, under which the players' group-licensing rights are assigned to the NFLPA. The NFLPA holds such rights in connection with almost every NFL player.

These group-licensing rights are then licensed to Players Inc, a for-profit subsidiary of the NFLPA that licenses the intellectual-property rights of NFL players. Currently, Players Inc licenses over 70 companies in the United States and throughout the world to use various aspects of its group-licensing rights in connection with commercial products and services, ranging from artwork and collectibles to trading cards and interactive games. Among Players Inc's licensees are several fantasy-football-game providers that use NFL football players' identities in their online fantasy-football games, including ESPN, AOL, The Sporting News, Electronic Arts Inc., CBS Sportsline®, and Fox Sports.

The group-licensing rights generate millions of dollars in revenue annually. These funds support the operation of the NFLPA, including its collective bargaining efforts on behalf of all players. The NFLPA

has been vigilant in enforcing its group licensing rights; for example, it has commenced lawsuits against a variety of entities, including the predecessor to respondent C.B.C., that sought to exploit these rights without permission.

Amici have a vital interest in clarification of the correct legal test for weighing the interests in enforcing publicity rights against the interests protected by the First Amendment. If left unreviewed, the Eighth Circuit's decision will threaten *amici*'s ability to license players' identities for commercial purposes. Businesses such as respondent C.B.C. may be able to reap the benefits of the labor, skills, and achievements of athletes and other celebrated figures, with no return to the individuals themselves. *Amici* also seek review of the Eighth Circuit's decision because it compromises their ability to enforce existing agreements that authorize use of an individual's identity and related information for commercial purposes.

SUMMARY OF THE ARGUMENT

In deciding whether a fantasy baseball enterprise could assert a First Amendment defense against enforcement of publicity rights held by major league baseball players, the Eighth Circuit adopted an *ad hoc* balancing test to weigh the competing interests supporting publicity rights and the First Amendment. The court below dismissed the primary justification for publicity rights—the public interest in allowing individuals to reap the rewards of their endeavors—and invoked the First Amendment's general interest in the

availability of information to preclude enforcement of the ball players' publicity rights.

Review of the decision below by this Court is essential in order to resolve the growing confusion regarding First Amendment limitations on the enforcement of state-law publicity rights. The Eighth Circuit's decision deepened a pre-existing division among the federal and state courts over the correct legal test for balancing the economic interests that give rise to publicity rights against First Amendment interests. In light of this conflict, the ability of an athlete, artist, or any other celebrated figure to control purely commercial exploitation of his or her identity will likely depend on the jurisdiction in which a law suit is commenced. Only this Court can bring clarity to this important question of federal law, and it should grant certiorari to do so now.

Review of the Eighth Circuit's decision is also imperative because its *ad hoc* balancing test is completely inconsistent with this Court's decisions in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), and *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987). These cases confirm that publicity rights are intended to vindicate individuals' economic interests in their identities. The Eighth Circuit, in direct disregard of this principle, treated the remuneration available to successful baseball players as a factor that weighs strongly *against* enforcement of their publicity rights. If this Court's recognition of state-law publicity rights is to have any force, the Court must reiterate that the

financial interests which underpin publicity rights are legitimate and merit full consideration.

A grant of certiorari is further warranted because of the substantial degree to which the Eighth Circuit's decision has unsettled expectations surrounding licensing negotiations and arrangements in that jurisdiction. Numerous industries, ranging from the burgeoning fantasy sports industry to the many businesses that market sports-themed products and other items involving celebrity identities, rely on licensing agreements of the sort at issue here. The decision below draws into question the enforceability of these agreements, and greatly complicates negotiations for future licensing relationships. Because of the broad implications of the Eighth Circuit's disregard of state-law publicity rights, the Court should grant the petition for certiorari.

Reasons for Granting the Petition

I. This Court Should Grant Certiorari to Resolve Confusion Over the Extent to Which the First Amendment Limits Enforcement of Publicity Rights.

A. The Courts Are in Conflict About the Legal Test for Balancing Publicity Rights Against First Amendment Interests.

The right of publicity, adopted by statute or common law in approximately half the states, establishes for every person the right "to control the commercial use of his or her identity." 1 J. Thomas McCarthy, The Rights

OF PUBLICITY AND PRIVACY §§ 1:3, 6:3 (2d ed. 2007); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995) (right of publicity secures "the commercial value of . . . fame and prevents the unjust enrichment of others seeking to appropriate that value for themselves"). This Court first examined the interplay between state-law publicity rights and the First Amendment in *Zacchini*, and instructed that the states' interests in enforcing those rights must be weighed against First Amendment concerns. 433 U.S. at 575-78. In the absence of any further guidance, the federal and state courts have developed disparate tests for publicity-rights claims. Because the choice of the applicable legal standard for these claims is often outcome-determinative, the enforceability of publicity rights varies significantly from jurisdiction to jurisdiction—a result that is unfair to individuals and businesses alike.

In determining when a First Amendment defense may preclude the enforcement of publicity rights, some courts look to the manner in which an individual's identity is used. Missouri, Colorado, and New Jersey employ a "predominant purpose" test, which examines whether the central purpose in using a person's identity is predominantly expressive or commercial. *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 373-74 (Mo. 2003); *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001); *Tellado v. Time-Life Books, Inc.*, 643 F.Supp. 904, 909-10 (D. N.J. 1986). New York and Virginia employ a similar, "purposes of trade" inquiry. Under this test, publicity rights are enforced when an individual's identity is used for purposes of trade (*e.g.*, advertising, marketing), unless the identity is used in a type of speech traditionally protected by the First Amendment (such

as a movie or novel). *See Town & Country Props., Inc. v. Riggins*, 457 S.E.2d 356, 362-63 (Va. 1995); *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

California follows a different approach, asking whether the identity at issue has been changed. Its "transformative" test assesses whether the identity has been altered in a way that is expressive, as opposed to a communication in which a persona is used for purely commercial gain. *Winter v. DC Comics*, 69 P.3d 473, 478-79 (Cal. 2003); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807-08 (Cal. 2001).

The Ninth Circuit, by comparison, applies distinct standards depending on whether commercial speech is at issue. When celebrity identities are used in commercial speech (such as advertising), the Ninth Circuit fully enforces publicity rights; in matters involving non-commercial speech, publicity rights are enforced when actual malice is demonstrated. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1188-89 (9th Cir. 2001); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 n.3 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

Kentucky, along with the Second and Sixth Circuits, have developed a "relatedness" test, which considers the relationship between the use of a person's identity and any "work" traditionally protected by the First Amendment. *See Parks v. Laface Records*, 329 F.3d 437, 460-61 (6th Cir. 2003); *Rogers v. Grimaldi*, 875 F.2d 994, 1004-05 (2nd Cir. 1989); *Montgomery v. Montgomery*, 60 S.W.3d 524, 529-30 (Ky. 2001). Labeled an "amorphous"

test, *id.* at 535 (Keller, J., dissenting), this standard rejects publicity-rights claims against works traditionally protected by the First Amendment unless the persona is used solely to attract attention to the work and the work itself is not significantly related to the identified person. *See, e.g., Parks*, 329 F.3d at 460-61; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

The Sixth Circuit has also employed, together with the Tenth and now the Eighth Circuits, an *ad hoc* balancing test that weighs society's interest in the use of a famous person's identity against that person's particular economic and noneconomic interests. Pet. App. 7a-9a; *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 974 (10th Cir. 1996). In balancing those interests, the Sixth Circuit has at least recognized the foundations of the right of publicity: "to protect the commercial interest of celebrities in their identities" and to avoid "unauthorized commercial exploitation." *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983). More recently, though, it has discounted the importance of those purposes by emphasizing otherwise available financial rewards. *ETW*, 332 F.3d at 938. The Eighth and Tenth Circuits have given negligible consideration to celebrities' interest in their publicity rights. They seek to justify this position based on the celebrities' perceived high incomes and ability to engage in other lucrative enterprises. Pet. App. 9a; *Cardtoons*, 95 F.3d at 974.

This latter approach essentially jettisons any meaningful balancing of the right of publicity and First

Amendment interests, as the decision below demonstrates. There is no dispute that the fantasy baseball games offered by respondent are a commercial enterprise that relies on professional athletes' identities as game pieces. Rather than examining what traditional First Amendment concerns might be at stake in this business, if any, and weighing those interests against the players' economic interests in controlling the use of their identities, the Eighth Circuit simply asserted that the information used in fantasy baseball games is "readily available in the public domain, and it would be a strange law that a person would not have a first amendment right to use information that is available to everyone." Pet. App. 7a.

In sum, there is growing disarray in the federal and state courts on the proper interplay between state-law publicity rights and the First Amendment. Until this Court clarifies the legal test for weighing these competing rights, enforcement of publicity rights will remain unpredictable, and negotiation of licensing agreements will become difficult as well. Accordingly, this Court should grant certiorari to resolve the issue.

B. The Decision Below Disregards This Court's Recognition That State-Law Publicity Rights Are Intended to Vindicate Economic Interests.

This Court has expressly recognized that the purpose of publicity rights is to vindicate the economic interests that celebrated individuals hold in their identities. Because the Eighth Circuit's decision is in

direct conflict with the precedents that establish this principle, review by this Court is appropriate.

In *Zacchini*, the Court upheld against a First Amendment challenge the publicity rights of an entertainer whose performance had been broadcast without consent. Observing that "[m]uch of [a performance's] economic value lies in the 'right of exclusive control over the publicity given to [the] performance,'" the Court identified several reasons for enforcing state laws that protect this prerogative. 433 U.S. at 575, 576.

First, enforcing publicity rights "prevent[s] unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." *Id.* at 576 (quotation and citation omitted).

Second, just as patent and copyright laws encourage the production of works of public interest, the Court explained, enforcement of publicity rights creates an economic incentive for investing in the production of a performance of interest to the public. *Id.* at 576-77 (citing *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 36 (1939)). In *San Francisco Arts*, the Court reiterated this rationale, noting that publicity rights are grounded in the recognition that a product derives from "talents and energy" and is "the end result of much time, effort, and expense." 483 U.S. at 532, 533 (quoting *Zacchini*, 433 U.S. at 575). In order to provide an incentive to develop a "quality product" that in turn benefits the public, the Court concluded, publicity rights are valid and

enforceable even where they result in incidental restrictions on expressive speech. *Id.* at 537 (citing 1 J. Thomas McCarthy, TRADEMARKS AND UNFAIR COMPETITION § 2:1, at 44-47 (1984)).

The Eighth Circuit cavalierly dismissed the importance of these economic interests that form the bedrock of state-law publicity rights. The court below found that respondent C.B.C. "uses baseball players' identities in its fantasy baseball products for purposes of profit . . . [and] commercial advantage," Pet. App. 7a, and acknowledged that "[p]ublicity rights . . . are meant to protect against the loss of financial gain," *id.* at 10a. The court, however, insisted that C.B.C.'s appropriation of the players' personas "barely, if at all, implicate[s] the interests that states typically intend to vindicate by providing rights of publicity to individuals." *Id.* at 9a.

According to the Eighth Circuit, the financial success enjoyed by professional baseball players, who may be paid "handsomely" and "can earn additional large sums from endorsements and sponsorships," strips the players of their state-law right to reap the benefits of their labor and skills. *Id.* The economic interests that underpin publicity rights, the court concluded, were not "especially relevant"—for the sole reason that "baseball players are rewarded separately for their labors." *Id.*

In addition to its other legal errors, that analysis turns on its head the rationale for enforcing publicity rights which this Court articulated in *Zacchini* and *San Francisco Arts*. As the court of appeals recognized, it is only by using the identities of the players—whose marketability and public profile are the result of innate

skill and years of hard work—that fantasy sports enterprises can offer their lucrative product. Discounting the economic interest that the players hold in controlling the use of their identities simply because a player is otherwise financially successful undermines the twin objectives of encouraging investment of human capital and avoiding commercial exploitation.

Because it places dispositive weight on whether an individual has been paid "handsomely," *id.*, the legal standard adopted by the court of appeals may preclude enforcement of publicity rights in a broad swath of cases. It is the identities of professional athletes, well-known artists and performers, and other celebrities that are frequently most valuable to the licensing community. And it is those very individuals who are often well compensated in light of their popularity. Yet under the Eighth Circuit's test, financial success essentially eviscerates their publicity rights. Indeed, it is unclear whether, as a practical matter, the right of publicity will retain any vitality in the jurisdictions governed by the Eighth Circuit's rule.

By tying the viability of a publicity-rights claim to an individual's opportunity to earn a significant income from other sources, the decision below also introduces tremendous uncertainty and arbitrariness into the enforcement of publicity rights. The Eighth Circuit has provided no guideposts for when an individual's salary or outside income might be large enough to preclude enforcement of a publicity-rights claim. Nor does the circuit court explain whether it had in mind the income level of particular individuals, or all players in a sport, or how to take into account the fact that some sports are

generally more lucrative than others. To the extent that publicity rights can be enforced at all under the Eighth Circuit's standard, the court of appeals offered paltry insight into how to apply its novel rule in a fair and predictable manner.

II. This Court Should Grant Certiorari Because The Decision Below Will Disrupt Settled Expectations in a Wide Range of Licensing Relationships.

A. The Eighth Circuit's Decision Calls Into Question Well-Settled Law Governing Publicity Rights.

Celebrated individuals, as well as the businesses that are authorized to use their identities, negotiate their licensing arrangements against the backdrop of well-settled law regarding publicity rights. *See, e.g.*, 2 J. Thomas McCarthy, The Rights of Publicity and Privacy §§ 7:1-7:29 (2d ed. 2007); Restatement (Second) of Torts § 652C cmt. b (1997); Restatement (Third) of Unfair Competition § 47 cmts. b & c (1995). Athletes and businesses in the sports industry have also relied for years on precedents that specifically recognize the enforceability of publicity rights when public personas are used in board games—a line of cases particularly apposite to the use of player identities in fantasy sports leagues. *See, e.g.*, *Uhlaender v. Henricksen*, 316 F.Supp. 1277 (D. Minn. 1970); *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144 (Sup. Ct. 1973); *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

By refusing to enforce players' publicity rights against a business that uses their identities exclusively for commercial gain, as opposed to a communication cloaked with a traditional First Amendment protection, the court of appeals has thrown this established law into substantial uncertainty. As the prior course of dealing between the parties here confirms, the use of players' names, likenesses, and statistical and biographical information in what is essentially an on-line board game has long been understood to require a license and payment of a royalty.

But the decision below has even more sweeping and disruptive consequences for long-standing commercial relationships. Respondent, a provider of fantasy sports games that had duly licensed the baseball players' identities, stipulated in its licensing agreement that upon termination of its license, it would not challenge the title held to the licensed rights held by the players' association or make further use of the licensed rights ("no challenge" and "no use" clauses). Pet. App. 10a-11a. On the basis of a contractual warranty provision never cited or briefed by the parties, the court of appeals *sua sponte* excused respondent from its obligation on a flimsy ground: that in light of the court's conclusion that the First Amendment prevented assertion of this right, the baseball players' association supposedly breached a warranty that it was the owner of the players' right to exclusive use of their identities. *Id.* at 12a-13a; *id.* at 14a (Colloton, J., dissenting).

This abrogation of the parties' contract by the Eighth Circuit's decision throws into serious doubt the validity of no-challenge and no-use provisions in

countless licensing agreements that have already been negotiated and executed and may be litigated within the Eighth Circuit's jurisdiction. These provisions routinely appear in licensing agreements and are critical to those agreements and to the rights of the athletes. If they are rendered unenforceable whenever a licensee's First Amendment rights are implicated, as the Eighth Circuit held, then their efficacy has been all but eviscerated.

B. The Eighth Circuit's Decision Has Significant Consequences for Commercial Relationships Involving Athletes in Many Sports, As Well As Other Celebrities.

In its narrowest application, the lower court's decision undermines the value of professional baseball players' identities in fantasy baseball games. But by calling into question professional athletes' continued ability to license their identities for use in these popular games, the Eighth Circuit's decision has consequences for the entire fantasy sports industry. The decision also casts significant doubt more broadly on the continued viability of the right of publicity not only for athletes, but for all individuals who previously enjoyed the ability to license their personas for commercial use. Given the broad consequences of the lower court's decision for individuals subject to the Eighth Circuit's decision, this Court should grant the petition for certiorari.

1. The Eighth Circuit's Decision Will Undermine the Entire Fantasy Sports Industry, Which is Already Large and Rapidly Growing.

The court of appeals' decision will have substantial effects on many athletes who previously enjoyed the right to license their identities for use in commercial fantasy sports leagues—a multi-billion dollar industry that is continuing to grow.

Fantasy sports have become wildly popular. Recent estimates put the number of people playing fantasy sports at between 15 and 30 million. *See* J. Rubner, *Technology Exec Tackles Fantasy Ball*, ATLANTA BUS. CHRON., Aug. 31, 2007 (19 million players in North America); G. Wang, *Fantasy Football's Growth Felt on Halloween, Big Screen*, WASH. POST, Nov. 2, 2006, at E10 (20 million); C. Holahan, *Fantasy Football 2.0*, BUS. WK. ONLINE, Sept. 1, 2006 (more than 15 million adults play fantasy sports). The industry has experienced annual growth of 10% in recent years, and the annual financial impact of the fantasy sports industry has been estimated at $1 billion to $4 billion. *See* B. Garrity, *Fantasy Sports Dark Horse Goes Long*, N.Y. POST, Nov. 22, 2007, at 31 (20% annual growth); Rubner, *supra* (economic impact of $3-4 billion); Wang, *supra* at E10 ($1-2 billion).

Amici, the National Football League Players Association and its subsidiary Players Inc, will be especially hard hit by the decision below. Fantasy football is by far the most popular fantasy sport, accounting for over 11 million players and approximately 50% of the overall revenues of the fantasy sports industry.

See By the Numbers, CHI. TRIB., Sept. 7, 2006, at 22; *see also* Garrity, *supra* at 31 (fantasy baseball is next most popular fantasy sport, accounting for 3 million players). Fantasy football will only continue to increase in popularity, as it is estimated that the number of fantasy football players is growing at 7-10% per year. Wang, *supra* at E10.

The commercial success of fantasy baseball and fantasy football has also encouraged the development of new fantasy sports competitions, including soccer, golf, hockey, lacrosse, NASCAR, track & field, and bowling. *See With a New Look Comes Variety*, MIAMI HERALD, Oct. 22, 2006, at D19 (noting development of Professional Bowlers Association's Fantasy Bowling Challenge); Y. Noguchi, *With World Cup, A New Media Game*, WASH. POST, June 10, 2006, at D01 (noting FIFA World Cup website's fantasy soccer competition); K. Yamamura, *It's Finals Fantasy in This Track League*, SACRAMENTO BEE, June 13, 2003, at C1 (describing emergence of fantasy track and field); S. Berg, *Certain Statistics You Don't Want Anyone Keeping*, WASH. POST, Nov. 8, 2002, at T31 (noting emergence of fantasy golf, hockey, and stock car racing). Fantasy leagues have even developed for professional wrestling, X-games, and bass fishing. *See* C. Walker, *A Big Catch; Fantasy Fishing Tournament Offers $1M Grand Prize*, BALT. SUN, Feb. 1, 2008, at 18Z; Berg, *supra* at T31. These recent additions to the fantasy sports world, along with the industry leaders, will be significantly affected by the Eighth Circuit's ruling.

2. The Enforceability of Athletes' Publicity Rights in the Larger Sports Industry Is Now Unclear.

In addition to undermining the licensing relationships of athletes in the fantasy sports arena, the Eighth Circuit's decision casts doubt on the continued enforceability of athletes' publicity rights with respect to commercial products and services in general. The court's sanctioning of the use of a player's identity incorporated as a game piece in a fantasy sports product may be viewed as an invitation to use players' identities without consent in other products, and will potentially have a substantial effect on all the multi-billion dollar merchandising of commercial products bearing athletes' names or likenesses.

Each professional sports league, including the National Football League, the National Hockey League, and the National Basketball Association, has developed an extensive program for the licensing of intellectual property, including the likenesses and identities of the leagues' players, in association with a large array of goods and services. Merchandise includes apparel, sporting goods, trading cards, action figures, commemorative memorabilia, posters, video recordings, video games, toys, and school supplies. Officially licensed sports-themed products and services, including those products and services licensed by sports leagues, generate billions of dollars in retail sales each year. *See, e.g.*, A. Schoettle, *What's In a Name? Lawsuit Could Lead Speedway to Change Licensing Policy*, INDIANAPOLIS BUS. J., May 16, 2005, at 3 ("Sports licensing has grown into a $17 billion annual worldwide

business."); F. Barringer, *The Media Business: Advertising—Addenda, Sales Rise 1.7% for Licensed Goods*, N.Y. TIMES, Jan. 9, 2003, at C6 (sports licensing sector rose 8%, to $11.3 billion); E. Fisher, *License to Go Out of Bounds: Sports Leagues Put Their Team Names on a Variety of Off-the-Wall Products*, WASH. TIMES, Nov. 23, 2001, at A1 (U.S. sports licensing business approaches $12 billion in annual sales).

The NFL has the largest share of the U.S. sports licensing business. *See* J. Goldblatt, *Eagles Gear Is Golden*, NEWS J., Jan. 14, 2004, at 113A (in 2003, NFL became largest pro sports licensor and world's fourth-largest licensor behind leaders Disney and Warner Brothers). NFL merchandising sales exceed $3 billion per year. *See* K. Goldberg Goff, *A Woman's Game*, WASH. TIMES, Oct. 28, 2007, at D01; E. Fisher, *NFL Sales Supremacy in Jeopardy*, WASH. TIMES, July 25, 2004, at C03.

The identities of the players enhance the value of these sales. Consumers buy a football jersey, for example, emblazoned with a player's name and number because of that individual's athletic prowess and the achievements of his team. *Amici* expend significant effort and resources to enhance the marketability of players' identities and promote their images. *See* Nat'l Football League Players Ass'n, http://www.nflplayers.com/user/template.aspx?mid=182&lmid=351&pid=0&type=n (describing efforts to "creat[e] player marketing opportunities, increase[e] brand awareness and develop[] valuable business partnerships") (last visited Mar. 20, 2008).

The Eighth Circuit's decision creates substantial uncertainty for athletes' continued reliance on their publicity rights in negotiating licensing contracts and entering into business relationships. The value of the players' labor and skill, as well as the efforts of players' associations, stands to be captured not by the players themselves, but by businesses such as respondent who seek to free ride on athletic accomplishments.

3. The Eighth Circuit's Decision Also Raises Wider Doubts Regarding Celebrities' Publicity Rights.

The Eighth Circuit's decision casts doubt not just on the enforceability of professional athletes' publicity rights, but on the rights of all celebrities who may be subject to this ruling—artists, performers, and other individuals—to receive compensation in exchange for the use of their names, likeness, and personas for commercial purposes.

The range of commercial products that use celebrity identities is limited only by the imagination. For example, commemorative posters, games, school supplies, candy dispensers, beverage stirring rods, and statuette replicas all have been the subject of litigation. *See, e.g.*, *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 (2d Cir. 1978) (Elvis Presley's photograph on poster); *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (plastic busts of Martin Luther King, Jr.); *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979) (Bella Lugosi's likeness on such products as plastic toy pencil sharpeners, soap products, target games, candy

dispensers, beverage stirring rods, shirts, cards, kites, bar accessories, and Halloween costumes); *Rosemont*, 340 N.Y.S.2d at 144 (board game with Howard Hughes's name and biographical information). Licensing of celebrity identities is a billion-dollar industry, making the scope of the licensing arrangements at issue undeniably substantial. *See, e.g.*, D. Barboza, *Advertising; The Business of "Preserving, Protecting and Insuring" the Legacy of Martin Luther King, Jr.*, N.Y. TIMES, April 1, 1996, at D7 (celebrity licensing industry grossed $2.5 billion in North America in 1995); W. Randle, *A "Who's Hot" of Licensing, Celebrity Endorsements Booming Retail Segment*, CHI. TRIB., May 28, 1990, at C1 ("Celebrity licensing is one of 9 or 10 major licensing categories and accounted for about 5 percent, or $3.5 billion, of last year's sales.").

The Eighth Circuit's decision introduces uncertainties regarding the ability of celebrated individuals to license the use of their identities in such commercial products in the future. It also unsettles the business reliance interests in countless existing licensing agreements involving athletes and other performers. To bring certainty to this pressing question and to clarify when the First Amendment precludes enforcement of publicity rights, this Court should grant the petition for certiorari.

Conclusion

For these reasons, the Court should grant the petition for a writ of certiorari.

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